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No. 00-1242

In the Supreme Court of the United States

UTILITY SOLID WASTE ACTIVITIES GROUP, ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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1999

QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied this Court's decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), in declining to decide the extent to which the Environmental Protection Agency's regulation of polychlorinated biphenyls (PCBs) under the Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.*, preempts state laws governing the disposal of PCBs.

2. Whether the court of appeals correctly determined that EPA was not required to show substantial evidence in the record in order to retain statutory restrictions on the use and disposal of PCBs.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 220 F.3d 683.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2000. Petitions for rehearing were denied on November 2, 2000 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on January 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, Utility Solid Waste Activities Group (USWAG), General Electric Company (GE), and others, sought review of a final rule of the Environmental Protection Agency (EPA), under the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601 *et seq.*, respecting the disposal of polychlorinated biphenyls (PCBs). The court of appeals, which has jurisdiction to review that rule, 15 U.S.C. 2618(a)(1)(A), rejected most of petitioners' challenges and remanded the rule to EPA for further proceedings.

1. TSCA directs EPA to regulate the manufacture, processing, distribution, use, and disposal of chemical substances and mixtures. See 15 U.S.C. 2605. TSCA specifically addresses, among other things, the class of chemicals known as PCBs. For many years, PCBs were commonly used in electrical equipment because they are excellent insulators and do not readily ignite. PCBs, however, are highly likely to pose a risk of cancer and other adverse effects to humans. Congress accordingly prohibited, through Section 6(e)(2)(A) of TSCA, the manufacture and use of PCBs "in any manner other than in a totally enclosed manner." 15 U.S.C. 2605(e)(2)(A). Congress further provided, however, that EPA may issue regulations authorizing use of PCBs in a manner other than a totally enclosed manner if EPA finds that such use "will not present an unreasonable risk of injury to health or the environment." 15 U.S.C. 2605(e)(2)(B). See Pet. App. 2a-3a.

2. This case arises from EPA's promulgation of a comprehensive, amended rule regulating disposal of PCBs. 63 Fed. Reg. 35,384 (1998) (the Disposal Rule). In 1991, EPA sought public comment on revising the PCB regulatory regime. 56 Fed. Reg. 26,738. Three

years later, EPA proposed regulations to allow many uses and disposal methods that previously had been prohibited. 59 Fed. Reg. 62,788 (1994). EPA ultimately adopted many changes that petitioners proposed in their comments, but the agency declined to authorize storage of PCBs for reuse, to amend certain PCB transformer regulations, or to allow decontamination of PCB-contaminated buildings and surfaces to the extent advocated by petitioners. EPA concluded that it could not make a finding of no "unreasonable risk," as would be necessary to support departing from Congress's ban with respect to those activities. See TSCA § 6(e)(2)(B) (15 U.S.C. 2605(e)(2)(B)); 63 Fed. Reg. at 35,399-35,400 (discussing storage for reuse); *id.* at 35,389 (discussing small transformers); *id.* at 35,398, 35,418 (discussing porous surfaces).

During the rulemaking, some commenters also urged EPA to announce an interpretation of Section 18 of TSCA, 15 U.S.C. 2617, that would embody a blanket preemption of state and local PCB disposal regulations. EPA declined to do so, explaining that the text of Section 18 preserves the authority of the States and their subdivisions to regulate chemical substances, 15 U.S.C. 2617(a)(1), except in carefully circumscribed circumstances, 15 U.S.C. 2617(a)(2)(A). EPA observed that "TSCA does not allow [EPA] to preempt State disposal rules which describe the manner or method of disposal of a chemical substance or mixture." 63 Fed. Reg. at 35,386. See, *e.g.*, 15 U.S.C. 2617(a)(2)(B) (providing that an EPA rule imposing a requirement described in 15 U.S.C. 2605(a)(6), which addresses the "manner or method of disposal" of chemical substances, does not have preemptive effect). See also 59 Fed. Reg. at 62,832 ("State PCB disposal rules are not preempted because they describe the manner or method of disposal

of PCBs."). EPA also noted other limitations, set out in 15 U.S.C. 2617(a)(2)(B) and 2617(b), on preemption of state and local laws. See 59 Fed. Reg. at 62,832. EPA observed that it was taking no regulatory action respecting blanket preemption and that it considered the matter outside the scope of the rulemaking. 63 Fed. Reg. at 35,386.

3. USWAG challenged portions of the Disposal Rule concerning storage for reuse and PCB transformers as well as EPA's view that TSCA does not preempt all state and local disposal regulations. GE challenged, among other matters, EPA's decision concerning decontamination and use of buildings and surfaces. The court of appeals rejected petitioners' arguments respecting those matters, as well as other challenges to EPA's rule. Pet. App. 1a-35a.

The court of appeals concluded that USWAG's arguments respecting preemption do not present an issue that is ripe for review. Pet. App. 8a-12a. It applied this Court's decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), which requires an evaluation of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. See Pet. App. 10a-11a. The court of appeals rejected USWAG's contention that its challenge necessarily is ripe for consideration because it "involves a pure question of law." *Id.* at 11a. The court observed:

> In this case, USWAG has identified no State or local regulations that it contends TSCA should preempt. Nor has USWAG offered evidence that it will suffer hardship if we defer consideration of this issue. Based on this record, we conclude that any hardship

> that USWAG could suffer is conjectural and thus, the issue is not ripe for review.

Id. at 11a-12a.

The court of appeals also rejected petitioners' challenges to the portions of the rule respecting storage for reuse, PCB transformers, and contaminated buildings and surfaces. The court acknowledged at the outset that the Administrative Procedure Act's (APA's) scope-of-review provision, 5 U.S.C. 706, applies to review of TSCA regulations, "except that 'the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by *substantial evidence* in the rulemaking record . . . taken as a whole.'" Pet. App. 5a (quoting 15 U.S.C. 2618(c)(1)(B)(i)) (emphasis added by the court). But the court concluded that, in light of Congress's categorical ban on most uses of PCBs and Congress's direction that EPA may provide regulatory exceptions to that statutory ban, TSCA reflects Congress's intent that courts apply the substantial evidence standard "only to those EPA decisions *permitting* the use of PCBs." *Id.* at 6a. "Nothing in the statutory scheme suggests that EPA must support by substantial evidence either its decision not to act or its decision not to craft as large an exemption as petitioners would like." *Id.* at 7a. The court of appeals accordingly employed the APA's "arbitrary and capricious" standard in evaluating EPA's decisions respecting storage for reuse, *id.* at 12a-14a, PCB transformers, *id.* at 16a-20a, and contaminated buildings and surfaces, *id.* at 22a-26a.

ARGUMENT

The court of appeals correctly followed *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), and applied familiar principles of administrative law to the facts of

this case. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals and presents no issue warranting this Court's review.

1. Petitioners contend that this Court should resolve a supposed conflict among the courts of appeals over whether the "hardship" prong of the *Abbott Laboratories* ripeness test applies when the issue to be reviewed is purely legal and the time for review of regulations is limited by statute. Pet. 10. Petitioners base that argument on a misunderstanding of *Abbott Laboratories*. Furthermore, the conflict that petitioners assert does not exist.

The Court's decision in *Abbott Laboratories* reflects the principle, arising from Article III and prudential considerations, that an administrative decision is not ripe for judicial review until the "decision has been formalized and its effects felt in a concrete way by the challenging parties." 387 U.S. at 148-149. Under *Abbott Laboratories*, the ripeness inquiry turns on a pragmatic assessment of *both* the institutional interests of the agency and the courts in avoiding premature or advisory adjudication, *and* the interests of the regulated parties in obtaining a timely resolution of the issue in dispute. This Court accordingly has directed lower courts "to evaluate *both* the fitness of the issues for judicial decision *and* the hardship to the parties of withholding court consideration." *Id.* at 149 (emphasis added). Both factors are relevant to determining whether the dispute presents a ripe judicial controversy.

The court of appeals correctly recognized that petitioners' preemption claim is not ripe under the *Abbott Laboratories* test. Petitioners "identified no State or local regulations that [they] conten[d] TSCA should

preempt." Pet. App. 11a. Hence, the courts and EPA have an institutional interest in avoiding premature adjudication of an entirely speculative issue. *Id.* at 11a-12a. Petitioners also failed to convince the court of appeals that they would suffer hardship if the court deferred consideration of the preemption issue until a State attempted to enforce a potentially conflicting law. *Ibid.* Consequently, petitioners have no substantial countervailing interest in adjudication of the preemption issue at this time. Indeed, judicial review of the preemption issue in this proceeding would be essentially advisory in light of the fact that any state and local authorities whose laws might be affected are not parties to this proceeding and would not be bound, under principles of res judicata, by any purported adjudication of preemption in this case.

Petitioners' suggestion that the court of appeals should have dispensed with the "hardship prong" in this case is without merit. See Pet. 14-16. This Court applies both prongs of the *Abbott Laboratories* test in cases that involve "purely" legal issues where Congress has set time limits for review of agency regulations. See *Whitman* v. *American Trucking Ass'ns*, 121 S. Ct. 903, 915 (2001). *American Trucking Associations* confirms that "hardship" can be a relevant consideration, regardless of the nature of the question presented and the statutory review scheme, in determining whether there is a genuine judicial controversy. See *id.* at 916 (evaluating "hardship" even though the case involved a legal issue arising in the course of preenforcement review). The court of appeals properly concluded, "[b]ased on this record," that the speculative nature of the preemption issue in this proceeding, coupled with the absence of hardship to the complaining parties, made that particular issue unripe for review. Pet. App.

11a-12a. The proffered hardship was purely "conjectural" and not remotely like the more concrete harm demonstrated in *American Trucking Associations*. *Ibid.*[1]

Petitioners are mistaken in suggesting that the court of appeals' decision conflicts with decisions of other courts of appeals. See Pet. 11-12. The decisions that petitioners cite simply reflect that the ripeness inquiry turns on an assessment of the facts and interests in each individual case.

For example, the District of Columbia Circuit ruled in *Eagle-Picher Industries, Inc.* v. *EPA*, 759 F.2d 905, 915-919 (1985), that a particular issue under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, was ripe for review. The court did not hold, as petitioners suggest here, that hardship is irrelevant whenever "the issues are predominantly legal, and the

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[1] In *American Trucking Associations*, "[t]he respondent States [were required]—on pain of forfeiting to the EPA control over implementation of [National Ambient Air Quality Standards]—promptly [to] undertake the lengthy and expensive task of developing state implementation plans (SIP's) that w[ould] attain [a] new, more stringent standard within five years." 121 S. Ct. at 916. Here, by contrast, USWAG neither "identified * * * State or local regulations that it contend[ed] TSCA should preempt," nor "offered evidence that it will suffer hardship" from "defer[red] consideration." Pet. App. 11a-12a. Moreover, the decision USWAG seeks would not, in itself, invalidate state or local regulations. USWAG and its members would be required to demonstrate in any concrete case that the challenged state or local regulation did not qualify for any of the additional exceptions to preemption set out in TSCA Section 18(a)(2)(B)(i) through (iii), as opposed to the "parenthetical exception" in Section 18(a)(2)(B), on which USWAG founds its case. See 15 U.S.C. 2617(a)(2)(B)(i)-(iii) and 2617(b), discussed at pp. 10-11, *infra*. See also pp. 3-4, *supra*.

time for judicial review is circumscribed by statute." Pet. 11. Rather, the court concluded that, because the specific matter at issue amply satisfied the fitness for review prong of the *Abbott Laboratories* test, the court did not need to reach the question of hardship to the complaining parties. See 759 F.2d at 918 ("Where the [judicial fitness] prong of the ripeness test is met and Congress has emphatically declared a preference for immediate review, assuming that constitutional case or controversy requirements have been met, no purpose is served by proceeding to the [hardship] prong.").

The District of Columbia Circuit reaffirmed in *Eagle-Picher* that, as a general matter, when "either the agency or the court has a significant interest in postponing review, [it] w[ould] decline to hear the petitioner's claim * * * unless, under the hardship to the parties prong, the interest of those who seek relief from the challenged action's immediate and practical impact upon them outweighs the competing institutional interests in deferring review." 759 F.2d at 915 (internal quotation marks and footnotes omitted). But the court determined in *Eagle-Picher* that EPA and the courts "had a *positive interest* in review during the statutory [review] period." *Id.* at 918. In this case, by contrast, the courts and EPA have a significant interest in postponing review. Petitioners seek adjudication of whether EPA's rule preempts state and local police powers, even though no particular state or local regulation is presently at issue. Neither the courts nor EPA have a "positive interest" in immediate adjudication of that abstract question and, under the *Eagle-Picher* rationale, the matter is not ripe for judicial review.

The other cases of the District of Columbia Circuit on which petitioners rely also do not support their assertion of a conflict. For example, in *Natural Re-*

sources Defense Council, Inc. v. *EPA*, 859 F.2d 156 (D.C. Cir. 1988), the court confronted a host of challenges to EPA's regulations under the Clean Water Act, which contains a similarly limited judicial review provision. *Id.* at 167. The court in that case affirmed the principle that, "where there are institutional benefits for court or agency in deferring review, we must consider the hardship to the challenging parties from delay, and proceed to the merits only when the latter outweighs the former." *Ibid.* The court dismissed as unripe petitioners' claim that EPA lacked statutory authority to impose "antibacksliding" permit rules, where the agency forswore "any intention" to act, "[t]he institutional interests in avoiding the waste of judicial resources on speculative claims clearly militate[d] against" review, and "[n]o hardship [wa]s asserted." *Id.* at 196. Similarly, in *Florida Power & Light Co.* v. *EPA*, 145 F.3d 1414 (D.C. Cir. 1998), the petitioner sought judicial review of EPA preamble statements of a legal nature. The court found the case unripe, citing, among other things, the petitioner's inability to demonstrate hardship under *Abbott Laboratories*. *Id.* at 1421.

The court of appeals in this case rightly rejected petitioners' assertions respecting the benefits of immediate review. See Pet. 16 n.9. USWAG staked its preemption claim on its interpretation of the "parenthetical exception" to preemption in Section 18(a)(2)(B) of TSCA. See Pet. 4. But other provisions of Section 18(a)(2)(B) set out additional exceptions, any of which could apply to a given state or local PCB regulation. See 15 U.S.C. 2617(a)(2)(B)(i)-(iii) and 2617(b) (exceptions applying to state regulations identical to EPA's, adopted under the authority of other federal laws, or prohibiting certain uses of a substance or mixture in a

State, and to regulations granted an exception by EPA). Thus, even if the court of appeals had reviewed USWAG's preemption claim and accepted USWAG's view of the "parenthetical exception," the court's ruling would not have eliminated the future need to evaluate state and local regulations for preemption on a case-by-case basis. See Pet. 16 n.9 (incorrectly suggesting that immediate judicial review would avoid future litigation). Immediate review therefore would not eliminate the hardship petitioners assert.[2]

2. Petitioners additionally contend that the court of appeals erred in applying TSCA's substantial evidence test. Pet. 17-23. The court of appeals' interpretation of Section 19(c)(1)(B)(i) is correct and does not conflict with the decisions of other courts of appeals.

There is no dispute that TSCA requires EPA to rely on substantial evidence when creating exceptions to TSCA's statutory restrictions on PCB use. See Pet. App. 6a-7a. Petitioners, however, contend that EPA must also come forward with substantial evidence when EPA determines that the evidence is insufficient to create an exception. Petitioners overlook what the court of appeals recognized: Congress imposed statutory restrictions on PCB use based on its legislative judgment that PCBs pose an unreasonable risk of injury; although Congress gave EPA authority to make exceptions to the restrictions if the exceptions are supported by "substantial evidence," Congress did not

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[2] Contrary to petitioners' suggestion (Pet. 16), TSCA's deadline for judicial review would not foreclose all later review of this issue. State or local laws or regulations regarding disposal of PCBs will be subject to timely challenge. In such cases, the parties with the greatest stake in the outcome will have an opportunity to argue for or against the validity of the particular law or regulation at issue.

authorize EPA or the courts to override the statutory restrictions whenever the record in a particular proceeding lacks substantial evidence confirming Congress's legislative determination that the restrictions are appropriate as a general rule. As the court of appeals explained:

> Nothing in the statutory scheme suggests that EPA must support by substantial evidence either its decision not to act or its decision not to craft as large an exemption as petitioners would like. Petitioner[s] may nevertheless challenge such a decision, or indecision as the case may be, but they must do so as most petitioners do in most informal rulemakings, by showing that the agency acted arbitrarily and capriciously.

Pet. App. 7a.

The court of appeals' reasoning is sound. Section 6(e)(2)(A) of TSCA provides that, after January 1, 1978, "no person may manufacture, process, or distribute in commerce or use any polychlorinated biphenyl in any manner other than in a totally enclosed manner." 15 U.S.C. 2605(e)(2)(A). Section 6(e)(2)(B) then allows EPA to authorize uses in other than a totally enclosed manner, but only if it "finds that such * * * use * * * will not present an unreasonable risk of injury to health or the environment." 15 U.S.C. 2605(e)(2)(B). Against that statutory backdrop, Section 19(c)(1)(B)(i) of TSCA provides that, "in the case of review of a rule under [Section 6(e)]," "the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by substantial evidence in the rulemaking record." 15 U.S.C. 2618(c)(1)(B)(i). Given that Congress itself determined to ban PCB use, it would be unreasonable to conclude that Congress authorized a

court to overturn the statutory ban if EPA did not marshal substantial evidence in a particular rulemaking for supporting the ban. Indeed, Congress made clear that EPA may relax the ban only if it finds that there is *no* "unreasonable risk of injury to health or the environment." 15 U.S.C. 2605(e)(2)(B).

The court of appeals correctly concluded that Section 19(c)(1)(B)(i) should be read in conjunction with Congress's judgment that, in order to protect the public from PCB exposure, the statutory ban should remain in force unless EPA determines that substantial evidence supports an exception. Cf. *Beecham* v. *United States*, 511 U.S. 368, 372 (1994) ("The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences."). "To require a greater evidentiary showing by EPA," the court of appeals noted, "would eviscerate the categorical ban of section 6(e) and would reverse the presumption against PCB use that the section imposes." Pet. App. 7a.

None of the TSCA decisions upon which petitioners rely endorses petitioners' novel argument. Rather, each decision arose from a case in which EPA authorized a departure from the congressional ban, or addressed an issue arising under a provision of TSCA other than Section 6(e). Although the courts in those cases correctly applied the substantial evidence standard to the rules before them, their reasoning does not reach the question presented here and therefore cannot create a conflict with the court of appeals' decision in this case.

In *Environmental Defense Fund, Inc. (EDF)* v. *EPA*, 636 F.2d 1267 (1980), the District of Columbia Circuit, like the court of appeals here, adopted the view that TSCA creates a rebuttable presumption against use of PCBs. See *id.* at 1275 n.17. Thus, the *EDF*

court's decision that substantial evidence is required to support an authorization of use (*i.e.*, to overcome the presumption) does not conflict with the court of appeals' decision here. *Id.* at 1277; see Pet. App. 7a (discussing *EDF*). The other TSCA cases petitioners cite do not address EPA's adherence to or departures from Section 6(e)'s ban. They instead involve rulemakings under other sections of TSCA, in which Congress's ban of PCBs played no part.[3]

Petitioners also claim that decisions construing other "substantial evidence" statutes "have uniformly abided by the statutory language and applied the substantial evidence test." Pet. 20. But petitioners make no attempt to account for whether the cited statutes contain statutory language similar to TSCA's ban on PCB use. Indeed, none of them do.[4] Thus, those decisions do

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[3] See *Chemical Mfrs. Ass'n* v. *EPA*, 859 F.2d 977 (D.C. Cir. 1988) (review of testing rule for 2-ethylhexanoic acid under Section 4 of TSCA, 15 U.S.C. 2603); *Ausimont U.S.A. Inc.* v. *EPA*, 838 F.2d 93 (3d Cir. 1988) (review of testing rule for fluoroalkenes under Section 4); *Shell Chem. Co.* v. *EPA*, 826 F.2d 295 (5th Cir. 1987) (review of testing rule for mesityl oxide under Section 4 of TSCA). Petitioners rely on a number of cases that do not involve TSCA at all. See Pet. 18 n.11. Those decisions, which simply note the searching nature of the substantial evidence test, Pet. 18-19, are inapposite to the question of whether the substantial evidence test applies to the particular regulatory decisions that petitioners challenge.

[4] See 15 U.S.C. 57a(e)(3)(A) (review of Federal Trade Commission's affirmative identification of unfair or deceptive commercial acts or practices); 15 U.S.C. 1193(e)(3) (review of Consumer Product Safety Commission's affirmative determinations of product flammability standards); 15 U.S.C. 2060(c) (review of Consumer Product Safety Commission's affirmative determinations of consumer product safety standards); 29 U.S.C. 655(f) (review of Occupational Safety and Health Administration's affirmative adoption of occupational safety and health standards).

not aid resolution of the particular issue presented in this case.

Finally, petitioners are wrong in suggesting that the court of appeals' construction would create a "strange and unworkable framework for judicial review of TSCA PCB rules." Pet. 22. The court of appeals has adopted a straightforward and sensible approach. If EPA elects to make an exception to Congress's ban on PCB use, its decision must be based on substantial evidence. If EPA declines to make an exception, its decision is reviewed under the arbitrary or capricious standard. It is petitioners' construction that would create a "strange and unworkable framework." Under their reading of TSCA, any party petitioning EPA to relax the ban could force a departure from Congress's presumption despite EPA's non-arbitrary determination to the contrary, merely because the vagaries of a given rulemaking did not yield substantial record evidence supporting Congress's judgment. That counter-intuitive construction would defeat Congress's clear mandate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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